LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 24 1969
JOHN F. DAVIS, CLERK

In The Supreme Court Of The United States

October Term, 1968

No. ~~1196~~

CARL ODELL ECHARD

Petitioner

vs.

STATE OF OHIO

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Ohio

ALLAN SHERRY
Attorney at Law
104 North Sycamore Street
Woodsfield, Ohio
Attorney for Petitioner

In The Supreme Court Of The United States

October Term, 1968

No. _____

CARL ODELL ECHARD
Petitioner

vs.

STATE OF OHIO
Respondent

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Ohio

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The petitioner, Carl Odell Echard prays that a writ of Certiorari issue to review the judgment of the Supreme Court of Ohio made and entered by said Court by Journal Entry filed on the 30th day of October, 1968, a copy of which is attached hereto as Appendix I.

OPINIONS OF THE COURT BELOW

No opinion was rendered by the trial court, other than the mere determination of guilt. The Ohio Court of Appeals upon consideration of an appeal, did render an opinion which was not published; the same is incorporated herein as Appendix III. The Supreme Court of Ohio did not render either an official or unofficial opinion but by Journal Entry overruled this Petitioner's Motion for leave to appeal.

The Appellate Court, in addition to the opinion, filed an opinion on reconsideration which was also unpublished and the same is incorporated herein as Appendix IV.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is invoked under Title 28, USCA Section 1257 (3), which section pertinently provides:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows: * * *, (3) by writ of certiorari * * *, or where any title, right, privilege or immunity is specially set up is claimed under the constitution."

This cause also invokes a violation of the Sixth and Fourteenth Amendments to the United States Constitution.

QUESTIONS PRESENTED FOR REVIEW

I

When the evidence of the State, in a criminal action, proves beyond a reasonable doubt that the defendant (petitioner) was not at the scene of a crime when the same was committed, is the subsequent conviction and imprisonment of this defendant not a denial of due process?

II

When a witness in a criminal case is under physical or legal compulsion to testify as to identification of the defendant, is not said testimony a violation of the defendant's right to a fair and impartial trial?

III

Where the defendant does not testify in a criminal action is it not error prejudicial to permit testimony charging the defendant with violating the law on another occasion.

IV

When a defendant in a criminal case is required to

be in a so-called "line-up" without the presence of counsel and the only man in said "line-up", is this not a violation of the defendant's rights under the Sixth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been previously ascertained by a law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

On February 10, 1966, at five o'clock a.m. two men entered the Country Kitchen (a restaurant) and according to the testimony of one of the employees one of the men used a screw driver and the other used a knife. Two waitresses were threatened; only one, Mrs. Thelma Ewers was called as a witness by the State. According

to the testimony of other State witnesses, at the same time this restaurant was being robbed, the defendant (petitioner) was being chased for another occurrence some twenty miles from the scene and was in custody the same day at that same time. The sole testimony of Mrs. Ewers placed the defendant (petitioner) at the scene of the crime. Mrs. Ewers did not know this defendant (petitioner) and had, according to her testimony, only seen him the day of the robbery. While the defendant (petitioner) was confined in another State and without Mrs. Ewers going to that State or seeing the defendant (petitioner) or any photographs, signed a sworn affidavit implicating this defendant in this crime.

Upon this evidence, the defendant (petitioner) was convicted and sentenced to ten to twenty-five years in the Ohio State Penitentiary. It is from this judgment and sentencing that this appeal is taken.

STATE OF THE PROCEEDINGS AT WHICH AND THE MANNER IN WHICH THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED.

During the trial of this action a Motion for Mistrial was made after the introduction of testimony by the sheriff regarding previous violations of the law by the defendant (petitioner) which Motion was overruled. This matter was raised again in the Appellate Court and the Supreme Court of Ohio.

Objection was made during the trial and raised again in the Appellate Court and Supreme Court of Ohio regarding the compulsion of a witness to testify.

ARGUMENTS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The questions which have been raised in all of the lower courts and which are being raised here are substantially as follows:

1. The State's evidence was in conflict. When the crime was allegedly committed the defendant (petitioner) was in custody some twenty or more miles away,

2. The eye witness who testified identifying this defendant had previously identified him by affidavit without ever having seen the defendant.

3. The defendant (petitioner) was subjected to a "line-up" without counsel, without being advised of his rights to counsel and was the only person in the "line-up".

4. It is error when a police officer during trial, in front of a jury, volunteers information accusing this defendant (petitioner) of another crime which was not an issue in this case.

IA

WHEN THIS PETITIONER'S INNOCENCE WAS ESTABLISHED BY THE STATE'S EVIDENCE HE SHOULD HAVE BEEN ACQUITTED AS A MATTER OF LAW.

The sole eye witness placed the defendant (petitioner) at the scene of the crime which occurred at 5:00 o'clock a.m. on the date in question (R56). She further testified that the crime occurred between 5:00 and 5:30 o'clock a.m. (R67). She further testified as follows:

Thelma Ewers (Cross Examination)

Q. — Are you sure, Mrs. Ewers, this wasn't four o'clock instead of five o'clock?

A. — It was five o'clock.

Q. — You're absolutely positive?

A. — Absolutely. I'm absolutely positive. (R72)

State Patrolman Jurrin (Direct Examination)

Q. — Did you go to St. Marys?

A. — Yes, sir, I did.

Q. — What time was this?

A. — Around five a.m. (R47).

State Patrolman Jurrin (Cross Examination)

Q. — Before five-fifteen when you crossed the bridge?

A. — It was right around five. Few minutes either way. * * *

Q. — Then these men were in West Virginia within five or ten minutes after five a.m. that morning?

A. — Yes, sir. (R53).

IB

THE SO-CALLED EYE WITNESS WAS UNDER COMPULSION TO TESTIFY.

Thelma Ewers (Cross Examination)

Q. — I'll rephrase it. Prior to May 11th, 1966, did you sign an affidavit concerning Carl Odell Echard and the robbery at the Country Kitchen, and at that time you had not seen him to identify him?

A. — Yes, I had not saw him.

Q. — So on February 16, 1966, an affidavit that you signed to have Carl Odell Echard—this man—returned from West Virginia as one of the persons who robbed the Country Kitchen—you hadn't seen him to identify him by name, had you?

A. — No, I hadn't. (R65)

IC

IT IS ERROR PREJUDICIAL TO THE DEFENDANT IN A CRIMINAL CASE, TO HAVE TESTIMONY THAT THE DEFENDANT HAS BROKEN THE LAW ON ANOTHER OCCASION.

The complaining witness, the Sheriff of Monroe County, was asked, "* * * now, did you notify any arresting authorities, Sheriff, of the description of the car?

A. — At approximately three o'clock that same morning a car pulled out of Newport that had got gas and didn't pay for it, and this was identified as the same car with these individuals. That's the reason the police and the Sheriff's Department were alerted.

CONCLUSION

The petitioner obviously could not have been in two places at the same time. Two state patrolmen specifically testified that they chased a car in Washington County across the St. Marys bridge into West Virginia at five o'clock a.m. (a few minutes before or after) and that the men were in West Virginia at ten after five the same day this crime was committed. Mrs. Ewers also

testified positively that the defendant (petitioner) entered this restaurant a few minutes after five a.m. in the company of another man, ordered food that while the same was being prepared, robbed the restaurant, and left in a car heading the opposite direction from where the state patrolmen chased this defendant (petitioner). The record also shows that the reason the state patrol pursued this car was not on the basis of this robbery but that a car of like description had purchased gasoline at a service station in Washington County and had left without paying for the same. In addition to this highly questionable testimony of Mrs. Ewers, we again emphasize that even though Mrs. Ewers did not know this defendant (petitioner) and had no basis to form an opinion, did by affidavit, identify him on February 16, 1966. We submit that the Trial Court did not direct a verdict of acquittal and this should have been done on the basis of the evidence.

It can be readily seen that without the eye witness testimony of Thelma Ewers, the petitioner certainly could not have been convicted. It is further apparent that a conviction as serious as this, based upon the highly questionable testimony of Mrs. Ewers is improper and a denial of due process and that this Court should admit this case for review.

It is, therefore, respectfully requested that a Writ of Certiorari be issued under the seal of this Court to the Supreme Court of Ohio to the end that the judgment of the Supreme Court of Ohio may be reviewed and reversed.

ALLAN SHERRY
Attorney for petitioner

APPENDIX I

ORDER OF THE SUPREME COURT OF THE STATE OF OHIO AFFIRMING JUDGMENT OF THE COURT OF APPEALS

This cause, here on appeal from the Court of Appeals of Monroe County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein. Filed: October 30, 1968

APPENDIX I

ORDER OF THE SUPREME COURT OF THE STATE OF OHIO OVERRULING MOTION FOR LEAVE TO APPEAL

It is ordered by the Court that this motion be overruled.

APPENDIX II

JOURNAL ENTRY, COURT OF APPEALS OF OHIO, SEVENTH DISTRICT, COUNTY OF MONROE

This cause came on to be heard on the appeal on questions of law from the judgment of the Common Pleas Court and was argued by counsel for the parties; and upon consideration, the Court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed and it is ordered that appellee recover of appellant its costs herein.

The Court finds that there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

Motion for reconsideration overruled.

Filed: October 14, 1967

APPENDIX III

OPINION OF THE COURT OF APPEALS OF OHIO

O'NEILL, J.

On February 10, 1966, some time between the hours of 4:00 a.m. and 5:00 a.m., two men entered a restaurant and robbed the employees of said restaurant of approximately $80.00. The defendant was later identified by one of the restaurant employees as being one of the persons engaged in the robbery. Defendant was brought to trial, found guilty, and sentenced to a term of ten to twenty-five years in the Ohio Penitentiary.

Appellant, for his First Assignment of Error, complains that the defendant was prejudiced because of testimony of a witness, which testimony appellant contends alleged that the defendant had broken the law on

another occasion. Reference is had to testimony at Pages 19 and 20 of the bill of exceptions wherein a witness testified that:—

> "At approximately three o'clock that same morning a car pulled out of Newport that had got gas and didn't pay for it, and this was identified as the same car with these individuals. * * *."

The very language of this testimony indicates that it was an identification of an inanimate object, to-wit: the car, rather than any individuals, and that it was not in any way any attempt to implicate the defendant in some other crime in such a manner that it would have prejudiced the defendant before the jury.

For his Assignment of error No. 2, the appellant insists that the verdict was contrary to law and was not sustained by evidence. He attaches as his reasoning the testimony of one of the victims of the subject robbery. This witness specifically identified the defendant as being one of the persons involved in the robbery. She was, however, somewhat indefinite at times and at other times very deliberate as to the time of day that the robbery took place. There was other evidence in the trial which indicated that the defendant was in another state at the time that the witness claimed he had perpetrated the robbery.

In the absence of any prejudicial error, the weight of the testimony of the witness is for determination by the jury, and the verdict in the instant case would indicate that the jury in the over-all accepted the credibility of the witness.

In his assignment of error number 3, the appellant contends that the State failed to prove that the alleged crime took place in Monroe County, Ohio. During the testimony, a witness was asked to identify and locate the place where the robbery took place. The witness identified the place as being "The Country Kitchen", and identified the Country Kitchen as being "right above Fly". There is other testimony contained in the bill of exceptions which mentions that the defendant travelled in his car on State Route #7. It has been held

by the Supreme Court that it is not essential that the venue of a crime be proven in express terms provided it is established by all of the facts and all of the circumstances in the case beyond a reasonable doubt that the crime was committed in the county and state as alleged in the indictment.

If all of the testimony of the various witnesses contained in the bill of exceptions were put together and considered with their various references to different locations, one could come to only one conclusion, that conclusion being that the loci of the crime was within Monroe County of the State of Ohio.

Approved
JOSEPH E. O'NEILL
Judge

Dated: September 12, 1967

APPENDIX IV

OPINION ON RECONSIDERATION OF THE COURT OF APPEALS OF OHIO

LYNCH, J.

United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 35 LW 4597, and Gilbert v. California, 388 U. S. 263, 87 S. Ct. 1951, 35 LW 4614, deal with identification of defendant in a police "line-up" without counsel for defendant already appointed being present, because this procedure did not give counsel for defendant adequate preparation for effective cross-examination of such witnesses.

In the instant case there was no police "line-up" as such. In the cross-examination of the sheriff he testified that one of the witnesses to the robbery, Shirley Ritchie, was brought into the room where the defendant was seated and was asked if this was the man (R. 11). However, Shirley Ritchie did not testify in this case. Defendant was not asked to do anything, and defendant was fully aware of the identification procedure.

The applicable case is Stovall v. Denno, 388 U. S. 293; 18 L.Ed. (2d) 1199, 35 LW 4610, which held that

the Wade and Gilbert rules should not be made retroactive, and that a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it.

Under the circumstances of this case, we hold that defendant's constitutional rights were not violated.

JONES, P. J. Concurs

O'NEILL, J. Concurs

Dated: October 5, 1967

Approved:
JOHN J. LYNCH
Judge